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INTRODUCTION

The United States, which "generates approximately 20% of the global total of greenhouse gas emissions," relies on foreign imports of finite fossil fuels in order to meet the country's ever-increasing demand for electricity.[1] Dependence on foreign countries' fossil fuel resources has contributed to high energy prices, national security issues and environmental risks.[2] "In its Annual Energy Outlook 2007, the U.S. Energy Information Administration estimates that U.S. electricity demand will grow by 39% from 2005 to 2030."[3]

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1. Michelle E. Portman et al., *Offshore Wind Energy Development in the Exclusive Economic Zone: Legal and Policy Supports and Impediments in Germany and the U.S.*, 37 ENERGY POLICY 3596, 3597 (2009) (citing J. Stephens et al., *Socio-political Evaluation of Energy Deployment (SPEED): An Integrated Research Framework Analyzing Energy Technology Deployment*, 75 TECHNOLOGICAL FORECASTING & SOCIAL CHANGE 1224, 1224-46 (2008)).

2. Peter J. Schaumberg & Angela F. Colamaria, *Siting Renewable Energy Projects on the Outer Continental Shelf: Spin, Baby, Spin!*, 14 ROGER WILLIAMS U. L. REV. 624, 625 (2009); Stephanie Showalter & Terra Bowling, *Offshore Renewable Energy Regulatory Primer* (Nat'l Sea Grant L. Center), July 2009, at i, *available at* http://nsglc.olemiss.edu/offshore.pdf.

3. ENERGY EFFICIENCY AND RENEWABLE ENERGY, U.S. DEP'T OF ENERGY, 20% WIND ENERGY BY 2030: EXECUTIVE SUMMARY 1 (May 2008), *available at*

With an ever-increasing energy demand worldwide, greenhouse gas emissions from conventional energy resources such as natural gas, oil and coal continue to act as a catalyst for global warming.[4] As a result, climate change is having a detrimental impact on the environment by increasing water temperatures, altering habitats and migratory patterns, causing sea-level rise and beach erosion, increasing vulnerability to hurricanes and floods, and causing a significant loss of coastal wetlands.[5] While the ocean is able to absorb carbon dioxide from the atmosphere and thereby help mitigate climate change, such absorption leads to ocean acidification, which threatens marine species and the marine ecosystem.[6]

In an effort to decrease its reliance on foreign countries and to help reduce carbon dioxide emissions, the United States has turned to wind as a promising renewable energy resource. While the U.S. has been very successful in utilizing land-based renewable wind energy, it has yet to produce electricity from offshore wind farms.[7] The world's first offshore wind farm was built in 1991 off the coast of Vindeby, Denmark,[8] and "all fully operational offshore wind farms are [currently located] in Europe."[9] In both coastal and offshore waters, wind is a powerful, dependable and infinite resource.[10] Because "60% of the U.S.

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http://www.20percentwind.org/Final_DOE_Executive_Summary.pdf.

4. *See* Megan Higgins, *Is Marine Renewable Energy a Viable Industry in the United States? Lessons Learned from the 7th Marine Law Symposium*, 14 ROGER WILLIAMS U. L. REV. 562, 563 (2009).

5. RHODE ISLAND OCEAN SPECIAL AREA MANAGEMENT PLAN, R.I. COASTAL RESOURCES MANAGEMENT COUNCIL, FACT SHEET, *available at* http://seagrant.gso.uri.edu/oceansamp/pdf/documents/doc_osamp_factsheet.pdf [hereinafter FACT SHEET OCEAN SAMP]; INTERAGENCY OCEAN POLICY TASK FORCE, THE WHITE HOUSE COUNCIL ON ENVIRONMENTAL QUALITY, INTERIM REPORT OF THE INTERAGENCY OCEAN POLICY TASK FORCE 10-11 (2009), *available at* http://www.whitehouse.gov/assets/documents/09_17_09_Interim_Report_of_Task_Force_FINAL2.pdf [hereinafter INTERIM REPORT].

6. INTERIM REPORT, *supra* note 5, at 11.

7. *See* Showalter & Bowling, *supra* note 2, at 4.

8. Higgins, *supra* note 4, at 567.

9. EUROPEAN WIND ENERGY ASSOCIATION (EWEA), OCEANS OF OPPORTUNITY: HARNESSING EUROPE'S LARGEST DOMESTIC ENERGY RESOURCE 17 (Sept. 2009), *available at* http://www.ewea.org/fileadmin/ewea_documents/documents/publications/reports/Offshore_Report_2009.pdf [hereinafter EWEA].

10. Joseph J. Kalo & Lisa C. Schiavinato, *Wind Over North Carolina*

population lives in coastal states,"[11] placing wind turbines offshore could help reduce electricity transmission costs and avoid issues commonly associated with locating land-based wind turbines in close proximity to homes. [12]

Although offshore wind has the potential to become a powerful source of alternative energy for the United States, the country is currently lagging behind as a player in the global offshore wind energy industry. Even within the United States, the federal government has continuously responded to the demand for alternative energy in a reactive manner, allowing the states to take the lead. Among the few states that have taken the initiative to develop offshore wind farms, Rhode Island is at the forefront. Rhode Island, appropriately nicknamed the "Ocean State," is proactively zoning an area of the ocean adjacent to the state, which includes both state and federal waters.[13] The motivational force behind such zoning is not only to serve as a management and regulatory tool that promotes the protection of Rhode Island's ocean-based resources, but also to identify the best areas for wind farm construction. Depending on Rhode Island's success, the Ocean State may serve as a model for the federal government by demonstrating the benefits of a proactive approach to offshore wind farm development.

Part I of this Comment provides an overview of how the United States has delegated state and federal jurisdiction over the ocean to various agencies. Part I also provides background

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Waters: The State's Preparedness to Address Offshore and Coastal Water-Based Wind Energy Projects, 87 N.C. L. REV. 1819, 1821 (2009).

11. Jim Lanard, Managing Dir., Deepwater Wind, L.L.C., Panelist at the Ronald C. Baird Sea Grant Science Symposium: The Relationship Between Marine Spatial Planning, the Offshore Wind Industry, and Climate Change (Nov. 2, 2009), *available at* http://seagrant.gso.uri.edu/baird/2009/presentations/lanard.pdf.

12. Adam M. Dinnell & Adam J. Russ, *The Legal Hurdles to Developing Wind Power as an Alternative Energy Source in the United States: Creative and Comparative Solutions*, 27 NW. J. INT'L L. & BUS. 535, 544 (2007) (quoting Carolyn S. Kaplan, *Congress, the Courts, and the Army Corps: Siting the First Offshore Wind Farm in the United States*, 31 B.C. ENVTL. AFF. L. REV. 177, 190 (2004) (noting that aesthetic issues are commonly raised in opposition to the construction of wind farms located within the view of homeowners).

13. *See* DRAFT OCEAN SPECIAL AREA MANAGEMENT PLAN (SAMP): INTRODUCTION 5, *available at* http://seagrant.gso.uri.edu/oceansamp/pdf/samp/samp_100_Introduction_11.16.09.pdf [hereinafter DRAFT OCEAN SAMP].

information regarding the Renewable Energy Alternate Uses of Existing Facilities on the Outer Continental Shelf ("final rules") that were recently released by the U.S. Department of the Interior's Minerals Management Services ("MMS") as the regulatory process for issuing renewable energy project leases on the U.S. outer continental shelf ("OCS"). Part II explains the burdensome environmental review process involved in the MMS final rules and highlights some of the potential obstacles arising under the new legislation. In response to these identified problems, Part II recommends that Congress look to the Deepwater Port Act and the Coastal Zone Management Act as examples of legislation that may provide methods by which the MMS final rules can be further streamlined. Part III suggests that the federal government should consider creating new legislation for a federal Ocean Zone Management Act, which would utilize marine spatial planning. Finally, Part IV recommends that the federal government look to Rhode Island's Ocean Special Area Management Plan as an example of how the country may effectively zone the ocean to protect the health and vitality of the its resources, and to enhance state and federal coordination for the development of the offshore wind energy industry.

I. BACKGROUND

A. Regulatory Background for Siting Offshore Wind Energy Projects

In 1945, President Truman proclaimed U.S. sovereign rights over the U.S. Continental Shelf, which included "the natural resources of the subsoil and sea bed of the continental shelf . . . contiguous to the coasts of the United States . . . [and] subject to [U.S.] jurisdiction and control."[14] The Submerged Lands Act ("SLA"), enacted on May 22, 1953, quitclaimed to the coastal states all federal proprietary rights in the three-mile territorial sea extending seaward from the coastline to three nautical miles.[15] Thus, the states were granted title to the submerged lands under navigable waters within the territorial sea and the

14. Proclamation No. 2667, 3 C.F.R. 40 (1945).
15. 43 U.S.C. §§ 1301-1315 (2006).

"right and power to manage, administer, lease, develop, and use the said lands and natural resources all in accordance with applicable State law."[16] However, the SLA also reserved, both within and beyond state territory, the federal rights to "commerce, navigation, national defense, and international affairs."[17]

On August 7, 1953, shortly after the enactment of the SLA, the Outer Continental Shelf Lands Act ("OCSLA") codified the Truman Proclamation and delegated authority over mineral exploration and development of the outer continental shelf ("OCS") to the Secretary of the Interior.[18] The OCSLA defines the OCS as the "submerged lands lying seaward and outside of [State territorial waters]," which "appertain to the United States and are subject to its jurisdiction and control."[19]

As enacted in 1953, the OCSLA authorized the U.S. Department of the Interior to issue oil and gas leases to the "highest responsible qualified bidder" through a competitive bidding process for mineral exploration and development on the OCS.[20] However, until 2005, it was unclear which federal agency controlled *renewable* energy development on the United States' OCS.[21] "The U.S. Army Corps of Engineers [("ACOE")] claimed jurisdiction over . . . renewable energy projects [on the OCS] under [the OCSLA amendment to] § 10 of the Rivers and Harbors Act (RHA)."[22] Despite the ACOE's claim, Congress passed the Energy Policy Act of 2005 ("EPAct"), which gave the Department of the Interior the authority to regulate federal renewable energy activity on the OCS.[23] Consequently, section 388 of the EPAct gave the Department of the Interior the authority to "grant a lease, easement, or right-of-way on the [O]uter Continental Shelf for activities [that] . . . produce or support production, transportation, or transmission of energy from sources other than

16. *Id.* § 1311(a).
17. *Id.* § 1314(a).
18. *Id.* §§ 1331-1356.
19. *Id.* § 1331(a).
20. *Id.* § 1337(a).
21. *See* Showalter & Bowling, *supra* note 2, at 2 (citing 33 U.S.C. §§407-687 (2006)).
22. *Id.*
23. *See generally* The Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594 (2005) [hereinafter EPAct].

oil and gas."[24]

The following year, in March 2006, the Secretary of the Interior designated this authority to the Department of the Interior's Minerals Management Services ("MMS").[25] Furthermore, MMS was granted the authority to use facilities that were currently or previously used for "energy-related purposes or for other authorized marine-related purposes."[26] Although the MMS became the lead agency for permitting alternative energy activities on the OCS, the ACOE retained its authority over permitting any obstructions in navigable waters.[27]

A conflict soon arose between MMS and the Federal Energy Regulatory Commission ("FERC") regarding which agency had jurisdiction over hydropower facilities on navigable waters of the U.S., including the OCS.[28] On April 9, 2009, the Department of the Interior and FERC signed a Memorandum of Understanding, which granted MMS exclusive jurisdiction over non-hydrokinetic renewable energy projects and allowed FERC to maintain jurisdiction over hydrokinetic project licensing.[29] As explained in the Memorandum of Understanding, companies must first obtain a lease over the OCS through MMS before FERC may issue a license for the construction and operation of hydrokinetic projects.[30]

Like oil and gas leasing on the OCS, the MMS had to develop a regulatory process for leasing and permitting activities for renewable energy project activities on the OCS. In order to establish a regulatory program for authority granted to the MMS by section 388 of the EPAct, MMS published an Advance Notice of Proposed Rulemaking in the Federal Register in December 2005.[31] On April 29, 2009, MMS issued the final rules, which became

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24. 43 U.S.C. § 1337(p)(1) (2006).

25. Schaumberg & Colamaria, *supra* note 2, at 628 (quoting 43 U.S.C. § 1337(p)(1) (2006)).

26. 43 U.S.C. § 1337(p)(1)(D).

27. *Id.* § 1337(p)(9).

28. *See* Memorandum of Understanding between the U.S. Dep't of the Interior and the Fed. Energy Regulatory Comm'n (Apr. 9, 2009), *available at* http://www.mms.gov/offshore/AlternativeEnergy/PDFs/DOI_FERC_MOU.pdf [hereinafter MOU].

29. *Id.*

30. *Id.*

31. Advanced Notice of Proposed Rulemaking, Alternate Energy-Related Uses on the Outer Continental Shelf, 70 Fed. Reg. 77345 (Dec. 30, 2005).

effective on June 29, 2009.[32]

B. An Overview of the MMS Final Rules Regulatory Process and Environmental Review

1. MMS Final Rules

The MMS final rules for approving offshore wind energy facilities are very similar to the regulatory process for oil and gas leasing, which is unsurprising as MMS is the lead agency for both processes.[33] The final rules allow for the issuance of leases for access rights to commercially develop and assess federal submerged land sites, and to test technology for the use of offshore renewable energy.[34] Rights-of-way and rights-of-use easements may also be issued for activities that are needed to support renewable energy projects.[35] Commercial leases will have an operating term of twenty-five years[36] and will give the lessee the "access and operational rights necessary to produce, sell, and deliver power" on a commercial scale.[37] Such a lease will include the right to a project easement, enabling the lessee to install transmission and distribution cables, as well as pipelines, if needed.[38]

Like oil and gas leases, renewable energy project leases will be issued through a competitive bidding process, unless it is determined that there is no competitive interest.[39] For a competitive commercial lease, the lessee has six months from the effective date of the lease to submit a Site Assessment Plan

32. Preamble, Renewable Energy and Alternate Uses of Existing Facilities on the Outer Continental Shelf, 30 C.F.R. pts. 250, 285, 290 (2009) [hereinafter Preamble to the Final Rules].

33. Schaumberg & Colamaria, *supra* note 2, at 625.

34. Preamble to the Final Rules, *supra* note 32, at 19647.

35. *Id.*

36. *Id.* at 19670 (The twenty-five year term will "allow development, construction, and ultimately commercial production activities. An operations term longer than [twenty-five] years could be established if applicable parties determine that such a term is warranted (e.g., the lessee and project proponent negotiate a power purchase agreement with a [thirty-year] term before the lease is issued).").

37. *Id.*

38. *Id.* at 19647.

39. *Id.*

("SAP") to MMS.[40] The SAP provides a description of the various "site surveys, data gathering, and related facilities" and operations that are proposed by the applicant.[41] As MMS completes its leasing decision, the SAP undergoes a National Environmental Policy Act ("NEPA") review.[42] If the SAP is approved, then a five-year site assessment term begins during which time the lessee conducts site assessment activities and prepares and submits a Construction and Operations Plan ("COP").[43]

The COP, a detailed description of the project activities, construction and operations,[44] must also undergo a NEPA review before receiving MMS approval.[45] However, recognizing the burdensome process of conducting two NEPA reviews, MMS decided that an applicant may choose to submit the SAP and COP simultaneously in order to "reduce the review time and gain efficiency."[46] In either case, once the COP has been approved, the lessee's commercial lease term begins.[47] While the promulgation of the final rules signifies substantial progress in the development of the offshore wind energy industry, several issues have been raised regarding the process.

2. MMS Final Rules and the NEPA Environmental Review Process

Under the MMS final rules, NEPA subjects offshore wind farm proposals to multiple reviews, each of which is likely to entail a complete Environmental Impact Statement ("EIS").[48] NEPA expressly mandates that an EIS be conducted to evaluate the potential impacts of any "'proposed major Federal actions significantly affecting the quality of the human environment.'"[49]

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40. *Id.* at 19670.
41. Kalo & Schiavinato, *supra* note 10, at 1839 (citing 30 C.F.R. §§ 285.605-.618 (2009)).
42. Preamble to the Final Rules, *supra* note 29, at 19690.
43. Schaumberg & Colamaria, *supra* note 2, at 634-35.
44. Kalo & Schiavinato, *supra* note 10, at 1841 (citing 30 C.F.R. § 285.620).
45. Preamble to the Final Rules, *supra* note 32, at 19690.
46. *Id.* at 19670.
47. Schaumberg & Colamaria, *supra* note 2, at 635.
48. Portman, *supra* note 1, at 5.
49. Schaumberg & Colamaria, *supra* note 2, at 656; *see also* 42 U.S.C. §

An EIS must take the following factors into consideration: (1) the environmental impacts of the proposed action, including adverse effects that cannot be avoided; (2) alternatives to the proposed action; (3) short-term and cumulative impacts; and (4) "any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented."[50]

MMS predicts that the sale of any lease or the approval of any offshore wind farm plan will qualify as "'significantly affecting the quality of the human environment,'" and therefore require a complete EIS to be conducted as opposed to a more limited and concise Environmental Assessment.[51] In order for the MMS to prepare the necessary NEPA documents, the applicant must gather the information required for the environmental review process.[52]

For a competitive commercial lease, the first environmental review will be conducted at the lease sale stage.[53] The lease sale begins a series of events that may affect a state's coastal land, water or natural resources; such activities include the "construction, maintenance, operation, and decommissioning" of offshore wind farms.[54] Unless the Site Assessment Plan ("SAP") later introduces additional information that was not previously considered during the lease sale environmental review, the MMS will not be required to conduct a second environmental review until the COP is submitted.[55] However, if the SAP does introduce new information not previously considered during the lease sale review, then additional NEPA review may be required.[56]

During each NEPA review, there are multiple opportunities for comment and participation by affected state agencies, Indian tribes, the applicant, and the public.[57] A project applicant may proceed with the proposed actions once each EIS has been made

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4332(2)(C) (2006).

50. 42 U.S.C. § 4332(2)(C).

51. *Id.*; *see also* Schaumberg & Colamaria, *supra* note 2, at 656.

52. Schaumberg & Colamaria, *supra* note 2, at 657.

53. See *id.* (citing Preamble to the Final Rules, *supra* note 32, at 19691).

54. Kalo & Schiavinato, *supra* note 10, at 1838.

55. Schaumberg & Colamaria, *supra* note 2, at 657 (citing Preamble to the Final Rules, *supra* note 32, at 19690).

56. *Id.*

57. 40 C.F.R. § 1503.1 (2009).

available to the public[58] and approved by the Council on Environmental Quality.[59]

3. MMS Final Rules and the Coastal Zone Management Act

a. Background

In addition to the multiple EISs required by the NEPA, the MMS final rules call for multiple environmental reviews concerning compliance with the federal Coastal Zone Management Act of 1972 ("CZMA").[60] The CZMA was enacted by the federal government in order "to preserve, protect, develop, and where possible, to restore or enhance, the resources of the Nation's coastal zone for this and succeeding generations[.]"[61] While the federal government retains power over the outer continental shelf ("OCS"), Congress granted states the authority to develop and administer coastal programs, in accordance with guidelines set out in the CZMA, for the state's territorial sea and adjacent coastal lands.[62]

The Secretary of Commerce, through the National Oceanic and Atmospheric Administration, may only approve a coastal state's management program if the coastal state meets the requirements of the CZMA.[63] A state's management program must provide information regarding the implementation of the plan, intergovernmental and regional coordination, and the resolution of competing user conflicts.[64] The CZMA includes a federal consistency review process by which Congress essentially gives the states "veto power" to reject federal agency activities that are inconsistent with the state's Coastal Zone Management Program ("CZMP") if the activities are "within or outside the coastal zone that affect[] any land or water use or natural resources of the coastal zone."[65] This federal "consistency

58. Schaumberg & Colamaria, *supra* note 2, at 658 (citing 40 C.F.R. § 1502.19 (2008)).
59. *See* Preamble to the Final Rules, *supra* note 32, at 19648.
60. *Id.* at 19691 tbl.2.
61. 16 U.S.C. § 1452(1) (2006).
62. *See id.* §§ 1455-1456.
63. *See id.* § 1455(b)-(d).
64. *Id.* § 1455(d)(2)(F), (d)(10)(A).
65. *Id.* § 1456(c)(1)(A).

requirement" demands that federal agencies' activities be consistent with a state's CZMP "to the maximum extent practicable[;]" however, federal permittees and OCS developers *must* carry out their activities in a manner consistent with an affected state's coastal plan.[66]

Particularly relevant to the offshore wind industry, the CZMA requires states to include in their CZMPs a "planning process for energy facilities likely to be located in, or which may significantly affect, the coastal zone."[67] Because the significance of an energy facility extends beyond the state, the Secretary must consider whether there are any applicable national or interstate energy plans involved when reviewing an energy facility proposal for federal consistency.[68]

If a state determines that a federal agency's activities are inconsistent with the state's CZMP, the agency may appeal the decision by participating in a mediation process with the coastal state.[69] In addition, if the President finds a federal agency's inconsistent activity is "in the paramount interest of the United States" then the agency's action is exempt from compliance.[70] However, for an appeal pertaining to a federal permit or OCS exploration and development plans, the Secretary will examine the state's objection and conduct a de novo review to determine whether "the activity is consistent with the objectives of [the CZMA] or is otherwise necessary in the interest of national security."[71] Once the Secretary has determined that the activity

66. *Id.* § 1456(c)(1).
67. *Id.* § 1455(d)(2)(H).
68. *Id.* § 1455(d)(8).
69. *See id.* § 1456(h).
70. *Id.* § 1456(c)(1)(B).
71. *Id.* § 1456(c)(3)(A)-(B); Robert W. Eberhardt, Article, *Federalism and the Siting of Offshore Wind Energy Facilities*, 14 N.Y.U. ENVTL. L.J. 374, 393 (2006) ("[A]n activity is consistent with the objectives or purposes of the CZMA when it satisfies each of the following requirements: (a) it 'furthers the national interest as articulated in [16 U.S.C. § 1451 or § 1452], in a significant or substantial manner'; (b) '[t]he national interest furthered by the activity outweighs the activity's adverse coastal effects, when those effects are considered separately or cumulatively'; and (c) '[t]here is no reasonable alternative available which would permit the activity to be conducted in a manner consistent with the enforceable policies of the management program.'" (quoting 15 C.F.R. § 930.121 (2008)); *see also* Coastal Zone Management Act Federal Consistency Regulations, 71 Fed. Reg. 788, 829 (Jan. 5, 2006)).

is consistent with the objectives of the CZMA or is necessary in the interest of national security, the Secretary can override the state decision and allow a permit to be issued by the agency.[72]

b. CZMA Requirements Under the MMS Final Rules

Similar to NEPA review under the MMS final rules, two CZMA consistency reviews are required for a competitive, commercial offshore wind farm: "one . . . CZMA review for the lease sale action, *and* the SAP activities, and one . . . CZMA review for the COP."[73] According to the CZMA, a lease or grant will be considered a federal agency activity, whereas a SAP and COP will be considered a federal license or permit.[74]

For a competitive lease sale, a right-of-way ("ROW") grant, or a right-of-use easement ("RUE") grant, MMS will conduct a consistency review if it is reasonably foreseeable that the activities enabled by the lease sale will affect any land, water or natural resources of the state's coastal zone.[75] A lease or grant applicant will prepare information for the MMS to base its consistency determination on, "includ[ing] the proposed activity, its expected coastal effects, and an evaluation of how the proposed lease or grant is consistent with the state coastal management program."[76] Next, the MMS will submit its "'consistency determination' to the affected state at least ninety days prior to the lease or grant sale."[77] From the time the state agency determines that the data received from MMS is sufficient information upon which to base a consistency determination, the state agency will have sixty days to reach a consistency determination.[78]

If the state agency fails to make a decision within the sixty-

72. Eberhardt, *supra* note 71, at 392-93 (citing 16 U.S.C. § 1456(c)(3)(A); 15 C.F.R. § 930.120-.122); *see also* Coastal Zone Management Act Federal Consistency Regulations, 71 Fed. Reg. at 829.

73. Preamble to the Final Rules, *supra* note 32, at 19690.

74. Schaumberg & Colamaria, *supra* note 2, at 659 (citing Preamble to the Final Rules, *supra* note 32, at 19691 tbls.1 & 2).

75. Kalo & Schiavinato, *supra* note 10, at 1838 (citing 16 U.S.C. § 1456(c)(1)(A), (C); 15 C.F.R. § 930.35).

76. Schaumberg & Colamaria, *supra* note 2, at 659-60 (citing Preamble to the Final Rules, *supra* note 32, at 19651).

77. *Id.* at 659 (quoting Preamble to the Final Rules, *supra* note 32, at 19651); 16 U.S.C. § 1456(c)(1)(C).

78. Schaumberg & Colamaria, *supra* note 2, at 660 (citing 15 C.F.R. § 930.41(a)).

day period, MMS may infer concurrence by the agency.[79] If the state agency agrees with MMS that the lease or grant is consistent with the state's CZMP to the "maximum extent practicable[,]" then the sale or grant will be conducted.[80] However, if the state disagrees with MMS's consistency determination, then the agencies may seek mediation or sue in federal court;[81] also, the President may decide that approval of the proposed lease or grant is "in the paramount interest of the United States[,]" in which case MMS may proceed.[82]

A second CZMA consistency determination will not be needed for a commercial SAP unless different impacts from the proposed project have been identified after state approval of the commercial lease or grant.[83] While a lease or grant is treated as "agency activity" that must be consistent with a state CZMP "to the maximum extent practicable,"[84] a SAP is treated as a federal license or permit that must carry out its activities in a manner consistent with an affected state's coastal plan.[85]

Assuming the lease or grant and SAP consistency determination is combined, the second CZMA consistency determination will occur for a commercial COP.[86] The competitive lessee or grant holder is required to submit a consistency certification to MMS for both SAP and COP approval, which MMS will then submit to the affected state.[87] The information submitted to the state must include a copy of the consistency certification, data and information as required by the state's specific CZMP, and an evaluation of how the proposed activity is consistent with the state's program.[88]

Once the state has determined that it has adequate information to determine the consistency review, the state has six

79. *Id.*
80. Kalo & Schiavinato, *supra* note 10, at 1838 (citing 16 U.S.C. § 1456(c)(1)(A), (C); 15 C.F.R. § 930.35).
81. *Id.*
82. 16 U.S.C. § 1456(c)(1)(B).
83. Preamble to the Final Rules, *supra* note 32, at 19807.
84. 16 U.S.C. § 1456(c)(1)(A).
85. *See id.* § 1456(c)(3)(A).
86. Preamble to the Final Rules, *supra* note 32, at 19690.
87. Schaumberg & Colamaria, *supra* note 2, at 661 (citing 30 C.F.R. §§ 285.611(b), 285.627(b), 285.646(i) (2009)).
88. *Id.*

months to respond to NOAA or concurrence is inferred.[89] As mentioned above, the COP is considered a federal permit or license and therefore, MMS may not proceed if the state objects to the consistency determination or the Secretary of Commerce, on his/her own initiative or on appeal, does not find that "'the permitted activities are consistent with the objectives of the CZMA or are otherwise necessary in the interest of national security.'"[90]

II. OBSTACLES AND RECOMMENDATIONS FOR THE MMS FINAL RULES

A. The Need for a Mandatory Timeline

In addition to the NEPA environmental review process and the CZMA consistency determination, fifteen other federal regulations must also be complied with in order for MMS to approve an offshore wind energy proposal.[91] To complicate matters, these seventeen federal regulations are administered by nine different federal agencies and additional state regulations also apply to each project proposal.[92] Due to the abundance of federal and state agencies involved with the regulatory process for offshore wind energy projects, there are many occasions for proposal approval to be stalled or completely halted.[93] Unlike the five-year oil and gas leasing process, the final rules provide no mandatory timeline for renewable energy projects on the OCS.[94] Consequently, commentators estimate that the current regulatory process will take a minimum of six years to authorize the development of renewable energy projects on the OCS.[95]

One foreseeable source of delay arising under the MMS final rules stems from the fact that every proposal for an offshore wind farm requires multiple NEPA reviews, each of which may be challenged in court for adequacy and compliance by opponents

89. *Id.* (citing 15 C.F.R. § 930.62(a) (2008)).
90. *Id.* at 661-62 (citing Preamble to the Final Rules, *supra* note 32, at 19690).
91. Preamble to the Final Rules, *supra* note 32, at 19648-19659.
92. *Id.* at 19648-19652.
93. Eberhardt, *supra* note 71, at 386.
94. *See* Schaumberg & Colamaria, *supra* note 2, at 653.
95. *Id.* at 650.

intending to stall the application process.[96] Although the general public lacks standing to sue under NEPA, the Administrative Procedure Act provides an opportunity for the public to sue by claiming that they have suffered a legal wrong or have been adversely affected or aggrieved by a NEPA procedural violation.[97]

In 2001, Cape Wind Associates, L.L.C. ("Cape Wind") became the first developer to propose an offshore wind project in the United States.[98] Cape Wind plans to construct an offshore wind farm in an area of Nantucket Sound known as "Horseshoe Shoals," which is located on the OCS and subject to federal jurisdiction.[99] In an effort to stall the project, the Alliance to Protect Nantucket Sound ("Alliance") sued the Army Corps of Engineers ("ACOE") under the Administrative Procedure Act, claiming that the ACOE had violated both NEPA and the Rivers and Harbors Act when it granted a permit to place a data collection tower in Nantucket Sound.[100] Although Cape Wind ultimately prevailed, the Alliance successfully delayed the application and approval process for Cape Wind's offshore wind farm proposal.[101]

The application process for Cape Wind has been extensively drawn out over a period of eight years and Cape Wind has yet to establish a single offshore wind turbine in Nantucket Sound.[102] Without any official timeline in the final rules, and with so many potential roadblocks standing in the way of project approval, the process is "long, expensive, and unpredictable."[103] Lacking the necessary assurance, there is little incentive for developers,

96. Portman, *supra* note 1, at 5.
97. *Id.* at 6-7.
98. *See* Cape Wind, http://www.capewind.org/ (last visited Jan. 10, 2010).
99. *See* Alliance to Protect Nantucket Sound, Inc. v. U.S. Dept. of the Army, 398 F.3d 105, 107 (1st Cir. 2005).
100. *See id.* at 108.
101. *See id.* at 115-16.
102. *See* Alex Kuffner, *Several Companies Want to be the First to Develop an Offshore Wind Farm in the U.S.*, PROVIDENCE J., Aug. 16, 2009, *available at* http://www.projo.com/economy/OFFSHORE_WIND_RACE_08-16-09_EBF0D97_v106.33863bd.html.
103. Morgan Gopnik, Envtl. Consultant, Duke Univ., Address at the 8th Annual Ronald C. Baird Sea Grant Science Symposium: Integrating Offshore Renewable Energy into a Marine Spatial Planning Framework (Nov. 2, 2009) (transcript available at http://seagrant.gso.uri.edu/baird/2009/presentations/lanard.pdf).

investors, consultants, and other participants to fully commit to the advancement of the offshore renewable wind industry.[104]

One suggestion that has been posited in response to the lengthy and unpredictable MMS final rules is for the MMS to establish a timeline for the approval process.[105] While it may be difficult to enforce strict deadlines on environmental review processes like NEPA and the CZMA, the federal government did exactly that when it amended the Deepwater Port Act ("DWPA") in 2002.[106] In 2001, the President issued an Executive Order calling for expedited energy-related projects to help increase the production, transmission, or conservation of energy.[107] Consequently, Congress passed the Maritime Transportation and Security Act of 2002, which amended the DWPA to include natural gas facilities.[108]

The following year, the Secretary of Transportation delegated authority to the Administrator of the Maritime Administration to "issue, transfer, amend, or reinstate a license for the construction and operation of a deepwater port," in accordance with the DWPA.[109] Recognizing the urgent need for an alternative energy resource, Congress's 2002 amendment to the DWPA streamlined the regulatory process for issuing deepwater port licenses.[110] The entire licensing application and review process follows a mandatory 356-day timeline, 240 days of which are dedicated to a single NEPA review for all federal agencies.[111] In order to further

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104. *Id.*; Schaumberg & Colamaria, *supra* note 2, at 653.

105. Schaumberg & Colamaria, *supra* note 2, at 653.

106. *See* Lieutenant Ken Kusano, United States Coast Guard Headquarters (G-MSO-5), Address at the Cal. State Lands Comm'n Symposium & Tech. Exhibition: The Deepwater Port Act: Understanding the Licensing Process 1, 4-5 (Sept. 14-15, 2004) (transcript available at http://www.slc.ca.gov/Division_Pages/MFD/Prevention_First/Documents/2004/LNG%20ON%20THE%20WEST%20COAST/Kusano%20paper.pdf).

107. Actions To Expedite Energy-Related Projects, 66 Fed. Reg. 99, 28357 (May 18, 2001).

108. Kusano, *supra* note 106, at 4.

109. Organization and Delegation of Powers and Duties, Update of Secretarial Delegations, 68 Fed. Reg. 36496-01 (June 18, 2003).

110. Kusano, *supra* note 106, at 4.

111. MARITIME ADMINISTRATION OFFICE OF DEEPWATER PORTS AND OFFSHORE ACTIVITIES, DEEPWATER PORT LICENSING PROGRAM BROCHURE 9, *available at* http://www.marad.dot.gov/documents/DWP_--_Deepwater_Port_Licensing_Program_Brochure.pdf [hereinafter DEEPWATER

optimize the licensing process, an Interagency Memorandum of Understanding for Processing Deepwater Port Applications was released, detailing the various roles and responsibilities of the numerous federal agencies involved in the process.[112] While it is not suggested by this Comment that the MMS follow such an abrupt timeline, the DWPA is certainly demonstrative of Congress' ability to streamline and clarify regulatory processes when there is an immediate call for action. Additionally, the MMS should consider creating a similar Interagency Memorandum of Understanding for Processing Offshore Renewable Energy Applications that would expressly outline the role that each agency plays in the approval process.

If the federal government eventually decides that offshore wind energy development must occur more rapidly in order to meet national needs, the DWPA serves as a successful model of streamlining a regulatory process for offshore, alternative energy facilities. Only seven years after the 2002 DWPA amendments were enacted, three deepwater ports have been successfully licensed and constructed in the United States,[113] demonstrating the DWPA's success in streamlining the agency's regulatory scheme.

B. Uncertainty for Developers, Investors and Manufacturers

By ensuring offshore energy-market investors that the licensing process will follow a strict timeline, deepwater port facilities are a very attractive source of alternative energy.[114] Unlike the deepwater port licensing process, assurance of a streamlined regulatory process is lacking in the offshore wind energy sector, which may prove to be a serious hindrance in attracting developers, investors and turbine manufacturers to the United States. According to Deepwater Wind, the company selected by Rhode Island to be the state's preferred offshore wind developer, there are many questions left unanswered for

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112. Kusano, *supra* note 106, at 7.

113. *See* U.S. Department of Administration, Maritime Administration, *Licensing Process and Requirements*, http://www.marad.dot.gov/ports_landing_page/deepwater_port_licensing/dwp_faq/dwp_faq.htm (last visited Nov. 29, 2009).

114. DEEPWATER PORT, *supra* note 111, at 2.

developers, investors and manufacturers that may, in turn, prevent their involvement with offshore wind energy due to the unknown risks involved.[115]

In addition to lacking a mandatory timeline, the United States does not have manufacturing plants designed to produce offshore wind turbines and armored submarine cables.[116] Of the total costs for an offshore wind farm, turbines account for about 45% of all costs, and armored submarine cables, all of which are made overseas, account for about 12% of all costs.[117] European turbine manufacturers have expressed their disinterest in building an offshore wind turbine manufacturing facility in the United States unless there are "advance orders for 100 turbines a year—for ten years."[118] Deepwater Wind suggests that until the U.S. is able to provide the needed security to European manufacturers, American dollars will be spent overseas instead of domestically where the money could be going to American workers by creating thousands of jobs.[119]

C. Cumulative Impacts on Ocean Resources and Conflicting Ocean Uses

Although Europe is currently the global leader in offshore wind energy, European countries are facing challenges of their own, including the development of an offshore electrical grid infrastructure and issues stemming from uncoordinated and imprecise planning.[120] The United States may still be in an early enough stage to learn from Europe's mistakes and plan proactively in order prevent the same mistakes from occurring.

The only European countries that have dedicated specific offshore areas to wind energy facilities are the United Kingdom, Germany, Denmark, Belgium and the Netherlands.[121] There is currently very little organization among European countries in terms of "integrated strategic planning and cross-border

115. *See* Lanard, *supra* note 11, at 17.
116. *See id.* at 16.
117. *Id.*
118. *Id.* at 18.
119. *See id.* at 16.
120. *See* EWEA, *supra* note 9, at 8, 21.
121. *Id.* at 21.

coordination."[122] This lack of coordination stems from the fact that each country has its own agencies and legislation, which can lead to conflicts of interest for the use of maritime space.[123] Consequently, the European Wind Energy Association ("EWEA") recommends that EWEA countries dedicate particular areas for the use of offshore wind developments and electrical grid infrastructure in order to "send clear positive signals to the industry."[124] The EWEA believes that marine spatial planning, also known as ocean zoning,[125] will help to prevent increased costs of offshore projects that can result from "[d]rawn out and imprecise planning."[126]

Presently, the EWEA is working to establish cross-border cooperation among the European countries in order to develop a single offshore electrical grid connecting the North Sea, the Baltic Sea and the Mediterranean Sea.[127] Implementing a "common and streamlined planning approach and making optimal use of the maritime space . . . would aid projects crossing several Economic Exclusive Zones such as large-scale offshore wind projects, and the interconnectors of the future pan-European grid."[128]

Like Europe, each state in the United States has its own state agencies with state-specific legislation. Although the CZMA requires state programs to provide a "planning process for energy facilities likely to be located in, or which may significantly affect, the coastal zone," few states have actually taken steps to establish such programs.[129] Without proper state management programs that account for offshore wind energy facilities and interstate coordination of such facilities, the U.S. is destined to encounter the same problems plaguing Europe. In addition, there is no reliable intrastate or interstate method for predicting the cumulative impacts on the marine environment and future uses of the ocean that may result from offshore wind energy facilities in

122. *Id.* at 22.
123. *See id.*
124. *Id.* at 23.
125. Portman, *supra* note 1, at 9.
126. EWEA, *supra* note 9, at 21.
127. *Id.* at 8.
128. *Id.* at 23.
129. Eberhardt, *supra* note 71, at 390 (citing 16 U.S.C. § 1455(d)(2)(H) (2006)); *see* discussion *infra* Part IV.

the U.S.

Comments received during the Environmental Assessment of MMS's final rules expressed concern for the "industry-driven site selection process" that makes it more difficult to conduct cumulative impact analyses.[130] The MMS responded that cumulative impacts "will be assessed at each stage of environmental review of projects, including lease sales, in order to identify such effects and to recommend appropriate mitigation measures and monitoring."[131] Although it is critical for the MMS to consider all reasonably foreseeable activities that offshore wind energy facilities will have on various maritime uses and the environment, Europe has demonstrated that such an ad-hoc method of review insufficiently plans for cumulative impacts.

D. Federal Impetus for the Development of Offshore Wind Energy Facilities

Despite various issues arising under the MMS final rules, the new legislation exemplifies a federal interest in expediting the development of offshore wind energy facilities.[132] Additionally, in June 2009, President Obama established the Interagency Ocean Task Force, charged with creating a national policy that would enable intergovernmental cooperation in order to "secure the health and prosperity of the ocean, our coasts, and the Great Lakes."[133] Although the President has not issued an Executive Order calling for expedited offshore renewable energy facilities, as occurred with energy facilities under the DWPA, Obama's Task Force must develop a "framework for effective coastal and marine spatial planning,"[134] which is directly relevant to the siting of offshore wind farms.

The Task Force plans to use marine spatial planning to "address conservation, economic activity, user conflict, and sustainable use of ocean, coastal, and Great Lakes resources."[135]

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130. U.S. DEP'T OF THE INTERIOR, MINERALS MGMT. SERV., RENEWABLE ENERGY AND ALTERNATE USES OF EXISTING FACILITIES ON THE OUTER CONTINENTAL SHELF: FINAL RULE 25 (April 2009).

131. *Id.*

132. *See generally* Preamble to the Final Rules, *supra* note 32, at 19638.

133. INTERIM REPORT, *supra* note 5, at 2, 13.

134. *Id.* at 2.

135. *Id.* at 27.

Within just 180 days from the time the Task Force was formed, the group must develop the aforementioned framework for coastal and marine spatial planning.[136] At this time it is unclear how the Task Force will impact the new regulatory process for approving the development of offshore wind farms or other renewable energy projects, but Presidential recognition of the need for a well-coordinated regulatory framework for ocean planning and management is certainly promising.

III. RECOMMENDATION: AN OCEAN ZONE MANAGEMENT ACT

While states may be in the best position to create marine spatial plans for adjacent coastal waters, the federal government must provide legislation that would help coordinate such planning in state and offshore waters in order to guarantee interstate and intergovernmental coordination and consistency. The federal government should consider creating new legislation for a federal Ocean Zone Management Act ("OZMA"), through which the state and federal governments can utilize marine spatial planning in a manner that is consistent on both a state-to-state and national basis, and which accounts for conflicting user interests and cumulative impacts.

Much like the Coastal Zone Management Act ("CZMA"),[137] an OZMA would require the state and federal government to work cooperatively in utilizing marine spatial planning to zone the outer continental shelf. Specifically, the federal government would create specific guidelines detailing (1) what types of zones must be created under the OZMA, (2) what scientific research methods must be used in gathering data from which the zones would be established, (3) when and to what extent public and stakeholder participation must occur, and (4) what type of enforcement plan must be enacted to assure overall management of the zones once they are established.

Once the federal government develops marine spatial planning guidelines, the states could voluntarily participate in the process to create Ocean Zone Management Plans ("OZMP") for areas of the outer continental shelf adjacent to their coastal

136. *Id.* at 2.

137. *See generally* Coastal Zone Mgmt. Act of 1972, 16 U.S.C. § 1451 (2009).

waters. Incentives for state participation would come from federal funding and the offshore wind energy industry, which would likely be more attracted to developing projects in an area that has been properly zoned. In order to avoid jurisdictional conflicts, the federal government would work hand-in-hand with the individual states when developing such OZMPs, so that both state and federal interests would be taken into consideration. Each plan would ultimately be approved by the federal agency charged with administering the OZMA, likely the MMS.

Since both the state and federal governments would be heavily involved in the zoning process, once the management plan is approved, there would be areas specified for certain activities and developments. The idea behind this type of system can be likened to land-based zoning where construction of building "X" can only occur in areas zoned for "X"-type buildings.[138] The OZMA would solve many of the problems inherent in the current regulatory process for approving offshore wind farms and other ocean-based renewable energy projects.

As identified earlier, both the NEPA environmental review process and the CZMA federal consistency requirement provide a multitude of avenues for delaying the approval of offshore wind energy projects.[139] While compliance with both regulatory schemes is extremely important to protect the health of the marine environment and prevent conflicting federal and state plans, the processes can prove untimely and burdensome. The OZMA would essentially eliminate the need to conduct individual, complete EISs and consistency determinations for each wind farm proposal. By requiring each OZMP to account for state and federal regulations during the zone designation process, environmental impacts for various ocean uses would be taken into consideration while the program is being developed. Therefore, a less cumbersome environmental review process could be used when offshore wind farms are proposed in order to guarantee that the project meets the zone requirements, which would already be tailored for the specific use of offshore wind farm development.

Another benefit to creating OZMPs would be the ability to

138. See *generally* Village of Euclid, Ohio v. Ambler Realty Co., 272 U.S. 365 (1926).

139. *See* discussion *supra* Part II.A.

properly plan for cumulative impacts that may result from various ocean uses and global warming. While the MMS final rules rely on NEPA environmental review and CZMA federal consistency review to account for cumulative impacts, this approach considers only the effect individual developments may have on the coastal and marine environment. Such a system has been proven in the past to disregard the truly cumulative impacts that result overtime from multiple projects, as evidenced by coastal development.

Not only would the OZMA provide a more reliable system for planning for cumulative impacts, but it would also create greater certainty for offshore wind energy developers, investors and manufacturers. As the EWEA and Deepwater Wind opined, marine spatial planning and dedicating specific areas for offshore wind development "would send clear positive signals to the industry[,]" and entice European manufacturers to construct production plants in the United States.[140] State leadership is currently the driving force behind the offshore wind energy industry in the United States, although the Interagency Ocean Task Force may be a sign that the federal government will start taking the lead.

IV. THE RHODE ISLAND OCEAN SAMP AS AN EXAMPLE

Both Massachusetts and Rhode Island are at the forefront of offshore wind energy development and ocean planning. Massachusetts launched the Massachusetts Ocean Management Task Force in 2003, in order to "examine evolving ocean uses and develop a comprehensive approach to managing ocean resources."[141] On May 28, 2008, Massachusetts Governor Deval Patrick signed the Oceans Act of 2008, which requires the Secretary of Energy and Environmental Affairs to use comprehensive, science-based planning in order to establish the final promulgation of a management program for the state by

140. *See* EWEA, *supra* note 9, at 23; *see also* Lanard, *supra* note 11, at 16-18.

141. Massachusetts Office of Coastal Zone Management, *The Massachusetts Ocean Management Initiative*, http://www.mass.gov/czm/oceanmanagement/index.htm (last visited Feb. 16, 2010).

December 2009.[142] The final ocean plan was recently released and "provides a comprehensive framework for managing, reviewing and permitting proposed uses of state waters."[143] The plan is limited to inshore state waters, extending from the mean high water mark to three miles offshore, and also excludes most developed harbor and port areas.[144]

Similar to Massachusetts's Ocean Management Task Force, Rhode Island approved a Coastal Management Program in 1978, in order to manage the state's coastal waters and resources out to three miles offshore.[145] Rhode Island is currently engaged in developing an Ocean Special Area Management Plan ("Ocean SAMP") that will "serve as a coastal management and regulatory tool, based on the best available science, [to] promote[] a balanced and comprehensive . . . approach to the development and protection of Rhode Island's ocean-based resources."[146] The Ocean SAMP contains both federal and state waters, extending to thirty miles at its furthest point offshore.[147] Scheduled to have the research and draft Ocean SAMP complete by August 2010, the Rhode Island Coastal Resources Management Council ("CRMC") has worked extensively with federal and state agencies as well as

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142. Massachusetts Office of Coastal Zone Management, *Massachusetts Oceans Act of 2008*, http://www.mass.gov/czm/oceanmanagement/oceans_act/index.htm (last visited Feb. 16, 2010).

143. Massachusetts Executive Office of Energy and Environmental Affairs, *Patrick Administration Releases Final Blueprint for Managing Development in State Waters*, http://www.mass.gov/?pageID=eoeeapressrelease&L=3&L0=Home&L1=Ocean+%26+Coastal+Management&L2=Massachusetts+Ocean+Plan&sid=Eoeea&b=pressrelease&f=100104_pr_ocean_plan&csid=Eoeea (last visited Feb. 16, 2010).

144. *R.I. 'Way Ahead' of Mass. in Selecting Areas for Wind Turbines*, PROVIDENCE J, July 26, 2009, *available at* http://www.projo.com/outdoors/environmentaljournal/Environmental_Journal_26_07-26-09_L9F4I67_v6.31d1ff8.html.

145. *See* National Oceanic and Atmospheric Administration, *Ocean and Coastal Mgmt. in Rhode Island: Rhode Island's Coastal Program*, http://coastalmanagement.noaa.gov/mystate/ri.html (last visited Feb. 16, 2010); *see also* National Oceanic and Atmospheric Administration, *State Coastal Zone Boundaries: Rhode Island*, http://coastalmanagement.noaa.gov/mystate/docs/StateCZBoundaries.pdf (last visited Mar. 9, 2010).

146. *See* DRAFT OCEAN SAMP, *supra* note 13, at 3.

147. *Id.* at 5.

the public and local stakeholders.[148]

The Rhode Island Ocean SAMP provides a basic example of how the OZMA may operate if enacted. Since the OZMA would enable states to zone the ocean beyond three miles offshore, the state agency responsible for managing the state's submerged lands would need to work extensively with federal agencies that have jurisdiction over the outer continental shelf in order to zone federal waters. The Rhode Island General Assembly delegated exclusive authority for managing the state's submerged lands to the CRMC.[149] As the sole state agency with jurisdiction over the development, preservation, and restoration of Rhode Island's coast out to the three-mile limit,"[150] the CRMC may use its "compact, streamlined structure" to "coordinate well with all agencies and facilitate the complex Ocean SAMP process."[151] Many states have not delegated full authority over state submerged lands to one agency, so there may be multiple state agencies involved with the process.[152] The Rhode Island CRMC originally proposed the Ocean SAMP as a response to Governor Carcieri's January 2006 goal of harnessing 15% of the state's electricity from wind within three years.[153]

The Rhode Island Ocean SAMP project team has coordinated extensively with the federal agencies involved with energy facility planning and siting.[154] The two-year Ocean SAMP planning process is designed to "serve as a coastal management and regulatory tool, based on the best available science, which

148. *See* Rhode Island CRMC Ocean Special Area Management Plan: *Timeline for When Ocean SAMP Draft Chapters Will be Available to the Public*, http://seagrant.gso.uri.edu/oceansamp/pdf/samp/samp_develop_timeline.pdf (last visited Feb. 16, 2010).

149. OCEAN/OFFSHORE RENEWABLE ENERGY SPECIAL AREA MANAGEMENT PLAN (SAMP) PROPOSAL 1, *available at* http://seagrant.gso.uri.edu/oceansamp/pdf/documents/doc_osamp_proposal.pdf [hereinafter PROPOSAL OCEAN SAMP].

150. *Id.* at 2.

151. *See* LEADING THE WAY FORWARD: R.I. OCEAN SPECIAL AREA MANAGEMENT PLAN: A NATIONAL MODEL FOR THE FUTURE – YEAR ONE 2, 5 *available at* http://seagrant.gso.uri.edu/oceansamp/pdf/documents/doc_osamp_annualrpt.pdf [hereinafter LEADING THE WAY FORWARD].

152. *Id.*

153. PROPOSAL OCEAN SAMP, *supra* note 149, at 2.

154. *Id.* at 2, 4.

promotes a balanced and comprehensive . . . approach to the development and protection of Rhode Island's ocean-based resources."[155] Covering an area of about 1,467 square miles (3,800 square kilometers), the Ocean SAMP includes portions of Block Island and Rhode Island Sound and interconnected areas such as Buzzards Bay, Long Island Sound, Narragansett Bay and the Atlantic Ocean.[156] Activities occurring in coastal state waters, extending three miles offshore, are permitted primarily by the Army Corps of Engineers whereas federal activities occurring on areas of the OCS are regulated by the MMS.[157]

As would be required by the OZMA, and is currently required by the CZMA, the Ocean SAMP must comply with all federal programs, including the federal regulations that place substantial energy-related planning responsibilities on the states.[158] Section 305(b)(8) of the CZMA requires states to create a system for identifying where energy facilities may be located, how they will be managed, and how to coordinate with other agencies involved in planning and siting energy facilities.[159] Additionally, states are responsible for "identify[ing] legal techniques to be used in managing energy facility siting and related impacts."[160] Under an OZMA, similar requirements would direct the state and federal agencies involved with the ocean zoning to specify particular areas where offshore wind farms could potentially be sited.

Rhode Island is hopeful that when the Ocean SAMP is complete, the MMS will accept the management plan as an "alternative [to] the development of an Environmental Impact Statement," which is currently needed under the MMS final rules as part of the NEPA environmental review.[161] While an EIS process for offshore wind farms could, at a minimum take between five to seven years, the two-year Rhode Island Ocean SAMP process is intended to "meet the requirements of the MMS, the ACOE, NOAA, CRMC, and the Rhode Island Department of Environmental Management for scientific analysis and planning,

155. DRAFT OCEAN SAMP, *supra* note 13, at 3.
156. *Id.* at 2, 5.
157. *Id.* at 8.
158. *Id.* at 7.
159. *Id.* (citing 16 U.S.C. § 1455 (2006)).
160. *Id.*
161. PROPOSAL OCEAN SAMP, *supra* note 149, at 1.

including stakeholder involvement."[162]

To assure that the zoning of federal waters and Rhode Island state waters takes into consideration all user interests, the Ocean SAMP task force has integrated local stakeholder meetings and invited members of the public to engage in discussions about the project.[163] Such widespread involvement has encouraged anyone opposed to the project to come forward during the planning process so as to be "actively involved in the process of shaping a successful plan."[164] By encouraging public and stakeholder participation, the Ocean SAMP will hopefully avoid time-consuming lawsuits, such as those occurring with the Cape Wind project,[165] and enable offshore wind farms to be approved without prolonged delay.

In the MMS final rules, Rhode Island was mentioned as one of the states that is "well along in planning efforts that will help to determine appropriate areas of the outer continental shelf ("OCS") for development," and one with which MMS has been an active partner.[166] Furthermore, the MMS stated that "[s]uch efforts supported by the MMS environmental study and technical research initiatives, as well as the Coordinated OCS Mapping Initiative mandated by the U.S. Environmental Protection Agency, will contribute significantly as MMS implements this final rule."[167] Because Rhode Island has coordinated so closely with the federal agency, it is possible that MMS may be more open to forgoing certain environmental review processes when approving offshore wind energy projects in waters off the State's coast. If so, the simplified process will assist developers in their application process because they will know exactly what types of projects will be permitted in certain locations of the OCS as well as the standards by which permit applications will be considered.[168] Rhode Island anticipates "that by providing prescreened site selection . . . [the State will] offer[] value and

162. *Id.*
163. *See* LEADING THE WAY FORWARD, *supra* note 151, at 3.
164. *See id.*
165. *See* Alliance to Protect Nantucket Sound, Inc. v. U.S. Dept. of the Army, 398 F.3d 105, 107 (1st Cir. 2005).
166. DRAFT OCEAN SAMP, *supra* note 13, at 8.
167. *Id.*
168. *See* PROPOSAL OCEAN SAMP, *supra* note 149, at 3.

efficiency to a development community often frustrated by the unwieldy federal EIS process."[169]

The goals and objectives identified by Rhode Island in the Ocean SAMP are similar to the types of guidelines that should be set out in an OZMA. The Ocean SAMP and OZMA should be designed to: (1) "Foster a properly functioning ecosystem that is both ecologically sound and economically beneficial[;]" (2) "Promote and enhance existing uses[;]" (3) "Encourage marine-based economic development that meets the aspirations of local communities and is consistent with and complementary to the state's [and country's] overall economic development, social, and environmental needs and goals[;]" and (4) "Build a framework for coordinated decision-making between state and federal management agencies."[170] Clearly, the criteria that would be required in the OZMA would have specific requirements detailing exactly what zones must be considered, how the research could be conducted, and setting forth other aspects of the planning process that must be provided in order to assure that the states and federal government are consistent in zoning the ocean.

V. CURRENT STATUS OF RHODE ISLAND'S OFFSHORE WIND FARM DEVELOPMENT

Scientists from the University of Rhode Island, under the direction of the Coastal Resources Management Council, are collecting and analyzing data for the Ocean SAMP;[171] this research process began in August 2008 and will continue until August 2010.[172] While the Ocean SAMP research and drafting are being completed, Rhode Island has continued to push forward with the regulatory process for offshore wind energy facilities.[173]

In September 2008, Deepwater Wind, L.L.C. was chosen over six other companies to be the offshore wind turbine developer for Rhode Island.[174] Deepwater Wind plans to construct its turbines

169. *Id.* at 5.
170. DRAFT OCEAN SAMP, *supra* note 13, at 3-4.
171. FACT SHEET OCEAN SAMP, *supra* note 5.
172. LEADING THE WAY FORWARD, *supra* note 151, at 1, 4.
173. Alex Kuffner, *National Grid OKs Deal to Buy Deepwater's Wind-Generated Power*, PROVIDENCE J., Dec. 10, 2009, *available at* http://www.projo.com/news/content/DEEPWATER_GRID_DEAL_12-10-09_16GO58P_v27.3c1bb9c.html.
174. Alex Kuffner, *Several Companies Want to be the First to Develop an*

by using a lattice-work jacket structure, similar to that used by offshore oil and gas facilities.[175] The company proposed two different wind farm projects: (1) five to eight wind turbines to be located three miles off of Block Island, in Rhode Island state waters; and (2) one hundred wind turbines to be located approximately fifteen miles off Rhode Island's coast.[176] These offshore wind farms would generate about 1.3 million megawatt hours per year, thereby satisfying Governor Carcieri's goal of attaining15% of Rhode Island's energy consumption through renewable energy.[177]

In an attempt to prepare Rhode Island's electrical utilities for offshore renewable energy, Governor Carcieri signed legislation on June 26, 2009 calling for National Grid, Rhode Island's primary electricity provider, to "negotiate long-term contracts with renewable energy providers."[178] Immediately thereafter on June 29, 2009, the Quonset Development Corporation Board of Directors approved a ten-year lease contract, permitting Deepwater to lease 117 acres in the Quonset Business Park in order to produce wind turbines and establish its headquarters.[179] However, Deepwater's lease is conditioned upon its ability to secure the necessary federal and state permits, and obtain financing for the projects.[180]

According to Governor Carcieri's office, one "'significant milestone in Rhode Island's path toward developing the nation's first offshore wind farm'" is the recent power purchase agreement reached between National Grid and Deepwater Wind.[181] After

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Offshore Wind Farm in the U.S., PROVIDENCE J., Aug. 16, 2009, *available at* http://www.projo.com/economy/OFFSHORE_WIND_RACE_08-16-09_EBF0D97_v106.33863bd.html.

175. *Id.*

176. *Id.*

177. *See* Kalo & Schiavinato, *supra* note 10, at 1830.

178. Kuffner, *supra* note 174.

179. *Id.*

180. Alex Kuffner, *QDC OKs 10-Year Leases for Deepwater*, PROVIDENCE J., June 30, 2009, *available at* http://www.projo.com/business/content/BZ_DEEPWATER_LEASES_06-30-09_JTESQRM_v21.32a6740.html.

181. Alex Kuffner, *National Grid OKs Deal to Buy Deepwater's Wind-Generated Power*, PROVIDENCE J., Dec. 10, 2009, *available at* http://www.projo.com/news/content/DEEPWATER_GRID_DEAL_12-10-09_16GO58P_v27.3c1bb9c.html.

rejecting two previous offers by Deepwater Wind, National Grid agreed to pay Deepwater Wind 24.4 cents per kilowatt-hour of electricity starting in 2013, when the smaller wind farm off Block Island is expected to go on line.[182] This rate will then increase by 3.5% annually during the life of the twenty-year contract.[183] The agreement has yet to be approved by state regulators, but such approval would make Deepwater Wind "only the second offshore wind developer in the nation to tie up a power-purchase agreement with a utility."[184]

Because the long-term power purchase agreement "ensures pricing stability and guarantees a return on investment," the agreement is a critical step for Deepwater Wind toward securing financing for the development of Rhode Island's offshore wind farms.[185] The fact that Deepwater Wind has established an energy contract for specific wind farm projects seems to suggest that they are fairly certain where the offshore wind farms will be located, although the Ocean SAMP has yet to be completed. Many stakeholders are interested in the final outcome of the Ocean SAMP, which still must undergo review and be approved by the National Oceanic and Atmospheric Administration before becoming part of Rhode Island's CZMP.

CONCLUSION

States like Rhode Island and Massachusetts will continue to push forward with the development of offshore wind farms, despite the unavoidable setbacks that have already occurred. The recent release of the MMS final rules is a sign that the federal government recognizes the urgent need to move away from conventional energy resources and move toward alternative renewable energy resources such as offshore wind farms. Several issues arising under the new legislation have been identified and must be improved upon if the United States is serious about becoming a global leader in the offshore wind energy industry. While an OZMP is one recommendation for how the federal government may attempt to streamline the regulatory process and

182. *Id.*
183. *Id.*
184. *Id.*
185. *Id.*

plan for cumulative impacts, there are certainly other viable options that the government should take into consideration. Regardless of which regulatory scheme ultimately prevails, the United States should continue to push forward with the development of alternative renewable energy projects in order to meet future energy demands and help mitigate the detrimental effects of global warming.